FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 32

ALFRED E. ROTH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

ALFRED E. ROTH,
10 N. Clark St.,
Chicago, Illinois,
Pro Se.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 32

ALFRED E. ROTH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

If the judgment in this case is to stand, then petitioner must be added to the unfortunate victims whose cases are recorded in Borchard's "Convicting the Innocent".

This case proves that all too frequently the blindfold worn by the symbolical figure of Justice is merited.

Petitioner protesting his innocence, insists that a great injustice has been done him in the affirmance of the judgment. This case carries with it graver and more serious consequences than the execution of the judgment, and he exhorts this honorable Court to reconsider this case which conclusively establishes his innocence.

This Court has not only overlooked and misapprehended the facts but has misconstrued the established law and the facts established by the record. Erroneous inferences are drawn from the evidence in sustaining the case against Roth.

Without waiving all his contentions made in the original brief, petitioner presents this petition for a rehearing and in support of same respectfully shows the following:

I.

THERE IS NO EVIDENCE AGAINST ROTH.

The Government frankly concedes that (Gov. Br. 6) "the questions concerning the guilt of the petitioners, Glasser **and Roth,** depend upon a development and collocation of circumstances necessary to support the verdict". The opinion at page 4 quotes the concession as to Glasser only. The concession of the Government is significant in relation to Roth's contentions (as well as Glasser's, which were recognized by this Court) that error intervened to his prejudice in the many particulars urged. As stated in the opinion, page 5: "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of Justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since

there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." This rule must be applied to a consideration of Roth's case as well as Glasser's.

The opinion at page 4 states:

> "The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means;"

and at page 12 states: "The evidence against Roth discloses the following salient facts," and then reviews five cases in which Roth appeared as counsel for defendants with Glasser representing the Government. We will take up these cases in the order as they appear in the opinion and demonstrate that the facts have been misapprehended and misconstrued.

1. The opinion says at page 12:

> "Elmer Swanson, Clem Dowiat, and Anthony Hodorowicz, were arrested in connection with a still on Stoney Island Avenue. Frank Hodorowicz, the head of the Hodorowicz crowd, arranged a meeting with Kretske at his hardware store to 'take care' of the case. Horton was present and Kretske told the group that there was a lot of 'heat' on the case but that it could be arranged so that nobody 'would go to jail' for $1200, part of which 'Red' was to get. A down payment of $500 was made. **When a lawyer was sought, Kretske referred the prospective defendants to Roth. He represented them at the hearing before the Commissioner which was continued at the request of Glasser. After an indictment was returned, Roth appeared for trial to find that the case had been stricken from the docket with leave to reinstate it.** The defendants were never brought to trial. **None of the Hodorowiczes or their associates paid Roth for his services. Roth testified that he received his fee from Kretske.**" (Emphasis supplied.)

What did Roth do in this case? He accepted the employment of a referred case by another lawyer who paid him for legal services rendered. He appeared before the Commissioner ready for a hearing. On motion of Glasser and over the vigorous objection of Roth (R. 295), the defendants were denied and deprived of their rights to a preliminary hearing (See Pet. Br. 6-8). Roth prepared and appeared in the trial court ready for trial and then and there learned the case had been stricken with leave to reinstate without notice to him (R. 235-236, 837, 918-920).

And it must be remembered that not one of the clients nor anyone else testified to any misconduct or statements by or in the presence of Roth concerning any alleged unlawful conspiracy.

The opinion in reviewing the evidence against Glasser obviously does not deem worthy of mention his conduct in not bringing the defendants to trial and the striking of the case with leave to reinstate at the request of the alcohol tax unit agent in charge because of lack of evidence. **Why then indulge in inferences against Roth?**

The implications in the opinion are illogical if the presumption of innocence means anything.

> "The presumption of innocence is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman. * * * To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty." *Coffin* v. *United States,* 156 U. S. 432, 456.

There is nothing in this transaction furnishing the slightest indication of guilt of the charges in the indictment on the part of Roth.

2. This Court at page 12, reviews another case in which Roth appeared as defense counsel and says:

> "In June 1938 Glasser secured two indictments, one against Frank, Mike, and Peter Hodorowicz and Clem Dowiat, and the other against Frank, and Peter Hodorowicz, and Dowiat for the sale of illicit alcohol. Frank paid Ketske $250 after the indictments. Kretske later told him that nothing could be done as investigator Bailey was pressing Glasser. **Frank then went to see Roth, who with Kretzke went to see Glasser. Roth later told Frank that nothing could be done and suggested that he get an attorney and prepare to defend himself. Roth's explanation of this was that he went to Glasser to learn the latter's attitude toward clemency for Frank, and that he suggested the retention of two lawyers, one to defend Frank, and the other to represent the remaining defendants. Frank dispensed with Roth's services and was represented at the trial by one Hess. Frank paid Roth $50, but this was in connection with substituting some securities on his bond.**" (Emphasis supplied.)

The opinion has misconstrued and misinterpreted the evidence in respect to this case. No clemency or favor was sought from Glasser and there is no support in the record for this statement. Roth was of the opinion that as to at least three of the defendants, a trial would be futile (R. 858), and went to see Glasser on his attitude as to punishment on a plea of guilty. Roth reported to his clients that Glasser would insist on a substantial penitentiary sentence. Not satisfied with Roth's advice, as to pleas of guilty, other counsel was employed. Vindication of Roth's advice is found in the fact that all defendants were, upon a trial, convicted (R. 312).

Why is the evidence insignificant as to Glasser and significant as to Roth?

Obviously the evidence proves nothing as to either Roth or Glasser and this Court makes no mention of it in reviewing Glasser's conduct at page 10 of the opinion.

The conduct of Roth in this case is consistent with the conscientious and honest services of a lawyer.

3. This Court at pages 12-13 reviews another case in which Roth appeared as defense counsel and says:

> "Edward Dewes had been associated with the defendant Kaplan in a still at Spring Grove. That case was twice presented to a grand jury by Glasser but withdrawn on each occasion. Two days before it was presented a third time the defendant Horton told Dewes that Kretske wished to see him. Dewes went to Kretske's office and paid him $100 so that he would not be indicted. Dewes was no-billed in that case. Dewes was also involved in a still on the farm of one Beisner. It was raided and several were arrested. Dewes, Victor Raubunas and Edward Farber asked Horton to 'fix' that case, but when his price was thought too high, Farber, who had known Kretske for some time, took Dewes and Raubunas to Kretske's office. Kretske offered to take care of the case for $1200. Raubunas paid $300 and they were told they would need no lawyer at the preliminary hearing. Eventually Raubunas, Dewes and Beisner were indicted. Dewes thereafter paid Kretske $275 to 'fix' his case. **Kretske referred the matter to Roth who represented Dewes throughout his trial. Dewes testified that he neither retained nor paid Roth.**" (Emphasis supplied.)

After indictment of Dewes, Roth was retained by Attorney Kretske to represent Dewes throughout his trial and received his compensation from the forwarding attorney. Dewes was convicted and sentenced to the penitentiary (R. 555, 857-858).

If trying a case for another lawyer is per se evidence of criminal conduct, then every trial lawyer accepting such employment may just as well voluntarily surrender his license to practice law lest he subject himself to the ignominy of indictment, prosecution, and conviction for a crime for so doing.

Other than the representation of Dewes after being retained by Attorney Kretske there is no connection whatsoever between Roth and all the other facts set out in the opinion. This Court must have misapprehended a connection of Roth to the other facts in order to marshall them as salient facts against him. The Government did not even see fit to argue this case against Roth.

There is no evidence of any guilt on the part of Roth in connection with his conduct as a lawyer in this case.

4. Reviewing another case involving one Paul Svec represented by Roth as defense counsel at page 13, this Court said:

> "Paul Svec, an associate of one Yarrio, was arrested in 1937 for a liquor violation. Horton arranged his bond. In Svec's presence Horton picked up Kretske and Yarrio. They told Svec not to worry. He was thereafter indicted and convicted. While at liberty pending an appeal he was again arrested. This time he called Glasser, and according to the latter, offered him money. The following morning Glasser interrogated Svec in the hearing of a secreted agent of the Federal Bureau of Investigation and secured admissions that Svec had never paid Glasser money or received any promises from him, and that the call had been at the instigation of the arresting investigators. **Svec testified that Roth told him he 'stood up O. K.' under Glasser's questioning. Svec was discharged at the Commissioner's hearing.**" (Emphasis supplied.)

In this case, Roth was engaged directly by Svec to try both of his cases. Kretske did not refer these cases to Roth.

The Government did not see fit to argue this case against Roth but in the opinion, however, a strained inference is drawn against Roth because Svec testified that Roth told him he "stood up O. K." under Glasser's questioning. **If it is criminal for a lawyer to make comment to his client that he did well under questioning by a prosecutor while detained in his office, then the legitimate right of consultation between attorney and client exists no more.** It must be remembered that Svec testified that he never tried to "fix" a case or had one "fixed" (R. 559, 565, 566).

It is clearly an erroneous implication and interpretation to marshall as a salient fact the mere use of the vernacular of a bootlegger to express the substance of a statement that he did not involve himself, remembering that he was in custody under arrest for an offense awaiting a hearing.

5. This Court then at page 13, reviews the cases of Leo Vitale and Rose Vitale.

> "Glasser prosecuted Leo Vitale for the operation of a still. He was convicted and received a sentence of one hour in the custody of the marshal. **Vitale's wife, Rose, was the claimant in the subsequent libel action against a car allegedly used to transport illicit liquor. The case was referred to Roth by Kretske. Roth informed the Court that Vitale was 'O. K.' and that the car was not used for illegal purposes. As was the custom, the case was tried on the agent's report. It was dismissed. Investigator Dowd later informed Glasser that he had heard that Vitale had boasted that 'he got out of this for nine hundred dollars'.**" (Emphasis supplied.)

CASE OF LEO VITALE.

This Court erroneously marshalled as a salient fact against Roth the case of Leo Vitale.

In October, 1935 a still located on the farm of Charles Myers in LaSalle County, Illinois, was raided and Leo Vitale arrested (R. 441; Ex. 210). Vitale, represented by Attorney Spatuzza, was arraigned before Judge Wilkerson on July 11, 1938, pleaded guilty (R. 253; Ex. 165) and was sentenced to one hour in the custody of the marshal (R. 250-251; Ex. 165). The defendant was represented by neither Roth nor Kretske nor did any of the other alleged co-conspirators except Glasser, have any relation to this case. There is no suggestion in the opinion of any misconduct by Glasser, in connection with this case. No legitimate line of presumptions could in any way relate this case to the alleged conspiracy.

Roth never represented Leo Vitale in any case civil or criminal and did not even know him (R. 874).

LIBEL ACTION AGAINST THE CHRYSLER OF ROSE VITALE.

Six weeks after disposition of the Leo Vitale criminal case, on August 21, 1938, investigators raided the residence of Vitale in Peru, Ill., and took from the garage in the rear thereof the Chrysler Sedan belonging to Rose Vitale. A proceeding *in rem* was brought to forfeit the car. Roth was engaged by Rose Vitale to recover the car. He met her for the first time when she engaged him. She was referred to Roth by Kretske. As was the custom, the case was properly presented and tried on the agent's statement (R. 718). Judge Barnes testified, " • • • that statement is not sufficient to forfeit a car. The car was not in the place where the still was, the car belonged to the wife," and that he, Judge

Barnes, had no right to take the car (R. 718). Judge Barnes also testified that Roth represented his client and Glasser represented the Government in a proper fashion.

If it is criminal for a lawyer to present his client's cause based upon her sworn pleadings, then lawyers have no place in society and litigants have no right to be heard in court.

This case was not decided by Judge Barnes on any statement by Roth "that Vitale was 'o. k.' and that the car was not used for illegal purposes," but on the agent's statement.

Roth denied making the statement that Vitale was "o.k." and in this he is corroborated by Judge Barnes, who testified that he remembered the case and that the claimant (Rose Vitale) was the wife of a bootlegger (R. 717). Moreover, what possible difference did Leo Vitale's standing in society have to do with the ultimate disposition of this proceeding *in rem* to forfeit a car?

The opinion states: "Investigator Dowd later informed Glasser that he had heard that Vitale had boasted that 'he got out of this for nine hundred dollars.'" Certainly this $900 rumor had no reference to saving a car valued by the Government at $425 (Ex. 36; R. 224). If this rumor, dignified as a salient fact, had reference to the criminal case of Leo Vitale, what has that to do with Roth? The rumor "he got out of this for $900" does not refer to the recovery of a car.

If such a rumor which in no way involves Roth can be marshalled against him and wreck his career as a lawyer, then American Justice as we have known it, has fallen into decay.

There is nothing in this case from which to infer that the conduct of Roth tended to further the alleged conspiracy or that he was a party to any unlawful agreement. Even the rumor does not implicate anybody.

This concludes a review of the cases in which Roth appeared as counsel and in which Glasser represented the Government.

The opinion at page 13 then reviews the case of Edward and William Wroblewski in the Northern District of Indiana as follows:

> "In April, 1938 Edward and William Wroblewski were indicted in the Northern District of Indiana. They engaged Roth as their counsel. They did not remember how they met Roth. When asked by the court if anyone recommended Roth to him, Edward answered: 'No, sir, I don't remember whether it was a rumor about his name.'"

Is it evidence of defrauding the United States of the services of Glasser simply because Edward Wroblewski engaged Roth to represent him in Indiana, a district outside of the one in which Glasser prosecuted? And is it a salient fact against Roth, that Wroblewski, in answer to a question if anyone recommended Roth to him answered, "I don't remember whether it was a rumor about his name". This Court should not speculate with the liberty of a defendant simply because somebody said there was a rumor about his name, without at least some evidence of the nature of the rumor. The rumor must have been that Roth was a lawyer specializing in the handling of cases in the federal courts which was proven at the trial (R. 796, 749-750, 782, 783, 833-834, 882, 889, 890).

This Court has held that the alleged statements of Roth to Alexander Campbell (refuted by the physical

facts, the court records, Exs. 186-A, B, and C; R. 840, correspondence, Ex. 137; R, 842, and testimony, R. 635, 676, 838, 840-842), concerning the *Wroblewski* case in Indiana were not in furtherance of the conspiracy (Opinion, p. 15), but tended to connect Roth with it by explaining his state of mind. There must however, first be some independent proof of some wrongful act before we can hold one's alleged state of mind to be proof of the actual committing of wrongful acts.

An accurate analysis of the so-called salient facts demonstrates conclusively the innocence of Roth. The Government recognized this when it frankly conceded (Gov. Br. 12):

> "It is not our contention that the evidence precluded a verdict of innocence or that it compelled a conviction."

If the United States was allegedly defrauded of its governmental function, Glasser would thereby be an indispensable party.

This Court said, opinion page 4:

> "Admittedly the case against Glasser is not a strong one."

and the opinion, page 10, before commenting on the evidence against Glasser states:

> "Other evidence (than statements by Kretske constituting hearsay as to Glasser) tending to connect Glasser with the conspiracy is rather meager by comparison."

Yet, in the same cases in which Roth appeared as counsel with Glasser representing the Government, the evidence is considered substantial as to Roth.

Inferentially, this Court has held that the evidence against Glasser is insubstartial and that no doubt controlled this Court (Opinion, p. 4) in reversing as to Glasser on another ground, thus removing the keystone or foundation of the structure of the alleged conspiracy with the upper stories suspended in mid-air. Such inconsistent reasoning should not be the yardstick by which Justice is measured in the highest court in the land.

If the evidence against Glasser in opposing Roth was insubstantial, how can it be substantial as to Roth?

Obviously this Court erred in analyzing the evidence and a rehearing should be granted to correct same.

II.

THE TRIAL COURT IN FORCING ATTORNEY STEWART TO REPRESENT CONFLICTING INTERESTS WAS A DENIAL OF THE RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL TO GLASSER AND KRETSKE AND IN A CONSPIRACY CASE THIS PREJUDICIAL ERROR IS AVAILABLE TO ROTH.

This Court has reversed as to Glasser because he was ineffectively represented by counsel in that the trial court forced Glasser's lawyer to represent conflicting interests when he appointed him as counsel for Kretske. Although actually engaged in the trial of a case at the time the instant case was called for trial, Kretske's own lawyer who for weeks had prepared for trial, was denied a continuance. (See affidavit of Attorney Joseph Harrington, R. 174-178). The trial court ordered the immediate selection of the jury and there was nothing left for Kretske to do but accept the court's appointment of Stewart as his lawyer.

If Glasser had only half a lawyer then Kretske surely had only half a lawyer, and if Stewart was struggling

to represent two masters, the whole trial was a farce and the atmosphere of the trial was so permeated with such flagrant disregard for Constitutional rights as to affect all defendants. Failure to properly cross-examine witnesses, one instance of which is fully covered in the opinion, pages 8-9, certainly affected the petitioner, Roth, even though the particular witness did not directly implicate him. Error as to one in a conspiracy case is error as to all. *Logan* v. *United States,* 144 U. S. 263.

The Brantman evidence was admitted in furtherance of the alleged conspiracy against all defendants. What the jury might have done as a result of proper cross-examination of Brantman is mere speculation in which we cannot indulge to the injury of a defendant.

In *United States* v. *Thompson,* 113 F. (2d) 643 (CCA 7), the violation of a Constitutional right against one defendant was likewise applied to a co-defendant in a conspiracy case.

The Court at page 646, said:

> "It would be unjust and illogical to separate the two cases and uphold the judgment as to one defendant and reverse it as to the other. While the Constitutional Amendments upon which the defense of illegal search and seizure is based may have been available to only one defendant, nevertheless the trial of the two together, and the introduction of evidence against them both may well have worked to the prejudice of the other."

Equal Justice to all demands a reversal as to all.

III.

ADMISSION OF EXHIBITS 81A AND 113 AGAINST GLASSER WAS PREJUDICIAL AGAINST ROTH.

The opinion at page 15 holds that since the exhibits were admitted against Glasser alone, Roth's objection is without merit. In so holding this Court no doubt overlooked the cases of *Logan* v. *United States*, 144 U. S. 263; *Whealton* v. *United States*, 113 F. (2d) 710 (CCA 3); *United States* v. *Thompson*, 113 F. (2d) 643 (CCA 7).

The admission of the exhibits, consisting of various investigators' reports and a narration of the statements purportedly made to the agents by each of a large number of witnesses concerning the persons accused in the reports, being reversible error as to Glasser are likewise reversible error as to Roth.

In the *Logan* case this Court held that the acts of Logan in furtherance of the conspiracy being admissible against all the conspirators as their acts, the admission of incompetent evidence of such acts of Logan prejudiced all the defendants and entitles them to a new trial. Applying the holding in the *Logan* case, Roth is entitled to a new trial.

In *Whealton* v. *United States*, 113 F. (2d) 710 (CCA 3), in reversing a conviction against all defendants for failure to exclude a prejudicial exhibit introduced against one defendant the court at page 715 said:

> "While the limitation of the admission of the exhibit as to Coffin fixed the extent of its legal perview with respect to the several defendants, it is impossible to believe that its effect could be so discriminatingly limited in the minds of the jury.

> The really practical effect of the improperly admitted exhibit was to predispose the jury to belief in the defendant's guilt because Coffin's implied opinion that 'offenses' had been committed."
>
> • • •
>
> "The possibility of harm from the improper admission of Exhibit G-8 was substantial, not only as to Coffin but as to Whealton and Commonwealth Trust Company as well. True enough, the exhibit was not admitted in evidence against Whealton and Commonwealth Trust Company, nor could it have been under any circumstances."

In *United States* v. *Thompson*, 113 F. (2d) 643, the Court in reversing the conviction of all defendants because of the introduction of evidence illegally seized from one defendant, at page 646, said:

> "It would be unjust and illogical to separate the two cases and uphold the judgment as to one defendant and reverse it as to the other. While the Constitutional Amendments upon which the defense of illegal search and seizure is based may have been available to only one defendant, nevertheless, the trial of the two together, and the introduction of evidence against them both may well have worked to the prejudice of the other."

IV.

ADMISSION OF THE ALEXANDER CAMPBELL TESTIMONY WAS HIGHLY PREJUDICIAL AND REVERSIBLE ERROR.

The opinion at page 15 says: "The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind". The trial court admitted the testimony of Campbell against all defendants on the general and broad ground that it was in furtherance of the conspiracy (R.

678-680, 717). The testimony was not offered or received for the strained and narrow purpose now suggested in the opinion as legitimate.

As was said by Justice Cardozo, speaking for this Court in *Shepard* v. *United States*, 290 U. S. 96, at page 103:

> "The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

It will not do now to say for the first time, that the jury might have accepted the testimony "to explain a state of mind" and rejected it as evidence tending to show acts and conversations in furtherance of the alleged conspiracy charged. Beyond question the jury considered it for the broader purpose as the trial court intended they should.

In the *Shepard* case (*supra*), this Court at page 104 aptly said:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. * * * It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. Where the risk of confusion is so great as to upset the balance of practical advantage, the evidence goes out."
>
> * * *
>
> "These precepts of caution are a guide to judgment here."

The danger of improper evidence reaching a jury is best illustrated by a statement of a woman juror who, while excused as a juror in the case at bar, sat in another

case. In her article appearing in the "American Bar Journal" she says:

> "• • • in spite of the objections, often sustained by the judge, I couldn't help wondering whether jurors were supposed to be made of stone when they were told to disregard certain things" (R. 1054).

The admission of the Campbell testimony was reversible error.

In failing to so decide, this Court overlooked or misapprehended the prior holding of this Court, the principles of which have been applied to testimony similar to the Campbell testimony in every circuit in the land.

United States Supreme Court:

Boyd v. *United States*, 142 U. S. 450, 458.

First Circuit:

McDonald v. *United States*, 264 Fed. 733, 739;
Fish v. *United States*, 215 Fed. 544.

Second Circuit:

Sager v. *United States*, 49 F. (2d) 725, 729.

Third Circuit:

Melarango v. *United States*, 88 F. (2d) 264.

Fourth Circuit:

Walker v. *United States*, 104 F. (2d) 465;
Simpkins v. *United States*, 78 F. (2d) 594.

Fifth Circuit:

Fabaker v. *United States*, 20 F. (2d) 736.

Sixth Circuit:

Crimmian v. *United States*, 1 F. (2d) 643;
Nibblelink v. *United States*, 66 F. (2d) 178;
Frantz v. *United States*, 62 F. (2d) 737.

Seventh Circuit:

United States v. *Dressler*, 112 F. (2d) 972.

Eighth Circuit:

Nigro v. *United States*, 117 F. (2d) 624, 632;
Edwards v. *United States*, 18 F. (2d) 403;
Morrow v. *United States*, 11 F. (2d) 256;
Paris v. *United States*, 260 Fed. 529;
Gart v. *United States*, 294 Fed. 66.

Ninth Circuit:

McLafferty v. *United States*, 77 F. (2d) 715;
Flood v. *United States*, 36 F. (2d) 444;
Terry v. *United States*, 7 F. (2d) 28.

Tenth Circuit:

Coulston v. *United States*, 51 F. (2d) 178.

District of Columbia:

Laughlin v. *United States*, 92 F. (2d) 506;
Robinson v. *United States*, 18 F. (2d) 185.

V.

THE GRAND JURY WAS ILLEGALLY CONSTITUTED BECAUSE OF THE DELIBERATE EXCLUSION OF WOMEN FROM THE JURY BOX FROM WHICH THE GRAND JURORS WERE SELECTED.

On July 1, 1939, the law providing for women jurors became effective. The grand jury in the case at bar was summoned August 25, 1939 and was composed entirely of men. Women were deliberately excluded. The opinion on page 3 says that in view of the short time elapsing between the effective date of the law and the summoning of the grand jury, it was not error to omit names of women from the federal jury lists where it was not shown that women's names had yet appeared on the state jury lists.

This Court overlooks the allegation in the affidavit in support of the motion to quash that the federal jury commissioner refused to follow the state law on the ground that it was not mandatory and for the further reason that acting on the advice of the prosecutor, the clerk and commissioner were not required to include female electors in their jury list (R. 148). A motion to strike the motion to quash and affidavit in support of same was filed (R. 150). "By such motion a legal question was presented which must be determined from the averments of the motion to quash." *United States* v. *Johnson*, 123 F. (2d) 111, 118, namely, is it mandatory for the clerk and jury commissioner to follow the state law?

The reason now given by this Court to sustain the legality of the grand jury was not relied upon in the trial court by the Government, but the prosecutor took the position that they were not required to follow the state law and the trial court so held. To exclude women jurors was a plain and flagrant violation of the law and impels a reversal here.

Moreover, if the present reasoning of this Court is to stand then every public official and citizen may deliberately violate any law 56 days after its passage with immunity and defend on the ground that the violation took place a short time after the law violated was passed.

VI.

THE TRIAL JURY WAS PACKED BY THE ILLEGAL DELEGATION OF THEIR DUTIES BY THE CLERK AND THE JURY COMMISSIONER, WHO VIOLATED THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Glasser filed an affidavit in support of a motion for a new trial alleging that the petit jury was packed; that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and prepared exclusively from its membership, that the women on that list had attended jury classes whose lecturers presented the views of the prosecution, and that women not members of the league, but otherwise qualified were systematically excluded, **and tendered an offer of proof** (R. 1049-1051). By affidavit Roth joined with Glasser (R. 1057). Six of these women served as jurors in the instant case.

The Government did not controvert the affidavits by counter-affidavits or formal denials. By this conduct the Government impliedly admitted the facts alleged.

After presentation of the affidavits to the court and without argument the motion for a new trial was summarily overruled (R. 1046, 1057, 1059).

The opinion at page 19 says that the record is barren of an actual tender of proof on the part of Glasser, that Roth did not make an offer of proof in his affidavit and that the failure of the petitioners to prove their contention is fatal.

The opinion of this Court simply put, is that since the record does not disclose what Glasser and Roth said subsequent to the presenting of the affidavits the point must be overruled. This overlooks the well known actual court procedure that the presentation of an affidavit by a proponent in open court is not made mutely but with affirmation of its contents, nor does a trial court overrule a motion and the affidavit in support of it without being first advised of the facts stated in the affidavit.

Moreover, this Court should not countenance the deprivation of the fundamental right of trial by a fair and impartial jury because the record does not disclose that Glasser and Roth did not reiterate verbally that which had already been said in writing under oath.

CONCLUSION.

Petitioner from the very outset of the prosecution against him has contended and indeed, the record conclusively proves, that this prosecution was instituted out of private enmity against Glasser. The setting of such a prosecution required a bondsman, a bootlegger, and finally a lawyer who from time to time appeared as defense counsel in cases prosecuted by Glasser.

In selecting the lawyer necessary to complete its picture the Government had a varied choice as the record shows (R. 198, 251, 256, 270, 299, 311, 325, 411, 516, 556, 617, 632, 637, 696, 783).

The selection of Roth as a necessary scapegoat was aided by the fact that Kretske (then in the private practice of law) had referred a few cases to petitioner for trial.

That the petit jury, selected as it was, and sitting throughout a five week trial permeated with hostility, confusion and prejudicial misconduct, by both trial judge and prosecutor, could not see through this malicious plot is easily understood.

That the Circuit Court of Appeals was blinded by the verdict of the jury was of course disillusioning to petitioner; however he never despaired, feeling as he did, that his rights under the Constitution would zealously be guarded and invoked by appeal to the highest court in the land, a court to which a defendant could appeal without fear that petty animosity and naked jury verdicts would in themselves be sufficient to sustain the Government's burden of proving a defendant guilty beyond all reasonable doubt and to a moral certainty.

This feeling of hope was fortified by the frank concession of the Government in its brief (p. 12):

> "It is not our contention that the evidence precluded a verdict of innocence, or that it compelled a conviction."

The shattering effect of the opinion of this Court on petitioner is best described in the words of that Persian Philosopher, Omar Khayyam:

> "Indeed the Idols I have loved so long
> Have done my Credit in Men's Eye much wrong,
> Have drowned my Honour in a shallow Cup,
> And sold my Reputation for a Song."

Respectfully submitted,

Alfred E. Roth,
Pro Se.

February, 1942.

P. 7, 16, 18

SUPREME COURT OF THE UNITED STATES.

Nos. 30, 31 and 32.—OCTOBER TERM, 1941.

Daniel D. Glasser, Petitioner, 30 *vs.* The United States of America. Norton I. Kretske, Petitioner, 31 *vs.* The United States of America. Alfred E. Roth, Petitioner, 32 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 19, 1942.]

Mr. Justice MURPHY delivered the opinion of the Court.

Petitioners, together with Anthony Horton and Louis Kaplan, were found guilty upon an indictment charging them with a conspiracy to defraud the United States under Section 37 of the Criminal Code (R. S. Sec. 5440; 18 U. S. C. sec. 88).[1] Judgment was entered on the verdict and Glasser, Kretske, and Kaplan were sentenced to imprisonment for a term of 14 months. Roth was ordered to pay a fine of $500 and Horton was placed on probation. On appeal the convictions of Glasser, Kretske and Roth were affirmed.[2] We brought the case here because of the important constitutional issues involved. 313 U. S. 551.

Glasser was the assistant United States attorney in charge of liquor cases in the Northern District of Illinois from about March 1935 to April 1939. Kretske was an assistant United States attorney in the same district from October 1934 until April 1937. He assisted Glasser in the prosecution of liquor cases. After his resig-

[1] If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[2] 116 F. 2d 690.

nation he entered private practice in Chicago. Roth was an attorney in private practice. Kaplan was an automobile dealer reputed to be engaged in the illicit alcohol traffic around Chicago. Horton was a professional bondsman.

The indictment was originally in two counts but only the second survives here as the Government elected to proceed on that count alone at the close of its case. That count, after alleging that during certain periods Glasser and Kretske were assistant United States attorneys for the Northern District of Illinois, employed to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and more particularly violations of the federal internal revenue laws relating to liquor, charged in substance that the defendants conspired to "defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States" in such matters "free from corruption, improper influence, dishonesty, or fraud." The means by which the conspiracy was to be accomplished was alleged to be by the defendants' soliciting certain persons charged, or about to be charged, with violating the laws of the United States, to promise or cause to be promised certain sums to be paid or pledged to the defendants to be used to corrupt and influence the defendants Glasser and Kretske, and the defendant Glasser alone in the performance of their and his official duties.

All the defendants filed a motion to quash the indictment on the ground (a) that the grand jury was illegally constituted because women were excluded therefrom and (b) that the indictment was not properly returned in open court. Glasser, Kretske and Roth also filed demurrers to the indictment. The motion to quash and the demurrers were overruled and petitioners here renew their objections.

On July 1, 1939 two acts of the State of Illinois providing for women jurors became effective.[3] Section 275 of the Judicial Code (28 U. S. C. sec. 411) provides in substance that jurors in a federal court are to have the qualifications of jurors in the highest court of the State. Petitioners contend that the grand jury, composed entirely of men, and summoned on August 25, 1939, was illegally constituted because at the time it was drawn Illinois law required state jury lists to contain the names of women. How-

[3] Ill. Rev. Stat., 1939, c. 78, secs. 1 and 25.

ever, in 17 of the 18 counties comprising the Northern District of Illinois the county boards could wait until September, 1939, to include women on their jury lists.[4] Of course, for women to serve as federal jurors in Illinois it is not necessary that their names appear on a county list, but we are of opinion that, in view of the short time elapsing between the effective date of the Illinois acts and the summoning of the grand jury, it was not error to omit the names of women from federal jury lists where it was not shown that women's names had yet appeared on the state jury lists.

The record here adequately disposes of petitioners' contention that there is no showing that the indictment was returned in open court by the grand jury. It contains a placita in regular form which recites the convening of a regular term of the District Court for the Eastern Division of the Northern District of Illinois, "on the first Monday of September [1939] (it being the twenty-ninth day of September the indictment was filed)", and discloses the presence of the judges of that court, the marshal and the clerk. The indictment bears the notation: "A true bill, George A. Hancock, Foreman" and the endorsement: "Filed in open court this 29th day of Sept., A. D. 1939, Hoyt King, Clerk." Immediately following the indictment in the record is the motion-slip discharging the September grand jury, dated September 29, 1939, initialled by Judge Wilkerson and containing: "The Grand Jury return 4 Indictments in open Court. Added 10/30/39". The presence of this notation in the record is meaningless unless the indictment in this case is one of the four mentioned. The addition was obviously made to clarify the indorsement of the clerk so as to show clearly the return by the grand jury and thus avert the technical argument here advanced. While a formal *nunc pro tunc* order would have been the more correct procedure, especially since a new term of court had begun, we do not think that this informal clarification of the record amounts to such error as requires reversal. Cf. *Breese* v. *United States*, 226 U. S. 1.

---

[4] Section 1 of Chapter 78 of the Illinois Revised Statutes, 1939, applies to counties not having jury commissioners (into which class the 17 counties fall) and provides:

"The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as the jury list."

The demurrers to the indictment were properly overruled. The indictment is sufficiently definite to inform petitioners of the charges against them. It shows "certainty, to a common intent". *Williamson* v. *United States*, 207 U. S. 425, 447. The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy for which petitioners contend is not essential to an indictment. *Crawford* v. *United States*, 212 U. S. 183; *Dealy* v. *United States*, 152 U. S. 539. Such specificity of detail falls rather within the scope of a bill of particulars, which petitioners requested and received.

The indictment charges that the United States was defrauded by depriving it of its lawful governmental functions by dishonest means; it is settled that this is a "defrauding" within the meaning of Section 37 of the Criminal Code. *Hammerschmidt* v. *United States*, 265 U. S. 182.

It is unnecessary to explore the merits of the argument that the indictment is defective on the ground that it charges a conspiracy to commit a substantive offense requiring concerted action, namely, bribery, because, "The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to . . . defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." *United States* v. *Manton*, 107 F. 2d 834, 839.

Petitioners Glasser and Roth claim that the evidence was insufficient to support the verdict. Kretske makes no such argument but merely contends that the government's testimony was largely that of accomplices "to emphasize the inescapable conclusion that the evidence against petitioner (Kretske) was of a borderline character." Since we are of opinion that a new trial must be ordered as to Glasser, we do not at this time feel that it is proper to comment on the sufficiency of the evidence against Glasser.

Admittedly the case against Glasser is not a strong one. The Government frankly concedes that the case with respect to Glasser "depends in large part . . . upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict". This is significant in relation to Glasser's

contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.

On November 1, 1939 George Callaghan entered the appearance of himself and Glasser as attorneys for Glasser. On January 29, 1940 William Scott Stewart entered his appearance as associate counsel for Glasser. "Harrington & McDonnell" had entered an appearance for Kretske. On February 5, 1940, the day set for trial, Harrington asked for a continuance. The motion was overruled and McDonnell was appointed Kretske's attorney. On February 6 McDonnell informed the court that Kretske did not wish to be represented by him. The court then asked if Stewart could act as Kretske's attorney. The following discussion then took place:

"Mr. Stewart: May I make this statement about that, judge? We were talking about it—we were all trying to get along together. I filed an affidavit, or I did on the behalf of Mr. Glasser pointing out some little inconsistency in the defense, and the main part of it is this: There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together, and all the evidence—

"The Court: How would it be if I appointed you as attorney for Kretske?

"Mr. Stewart: That would be for your Honor to decide.

"The Court: I know you are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?

"Mr. Stewart: Your Honor could judge that as well as I could.

"The Court: I think it would be favorable to the defendant Kretske.

"Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer representing him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.

"The Court: Mr. McDonnell, you will have to stay in it until Mr. Kretske gets another lawyer, if he isn't satisfied with you.

"(To Mr. Kretske) Mr. Kretske, if you are not satisfied with Mr. McDonnell, you will have to hire another lawyer. We will proceed with the selection of the jury now."

A colloquy then ensued between the court, McDonnell and Kretske when the following occurred:

"Mr. Kretske: I can end this. I just spoke to Mr. Stewart and he said if your Honor wishes to appoint him I think we can accept the appointment.

"Mr. Stewart: As long as the Court knows the situation. I think there is something to the fact that the jury knows that we can't control that.

"Mr. McDonnell: Then the order is vacated?

"The Court: The order appointing Mr. McDonnell is vacated and Mr. Stewart is appointed attorney for Mr. Kretske."

Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial and was the most active of the array of defense counsel.

The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court "to have the assistance of counsel for his defense". "This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty" and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. *Johnson* v. *Zerbst*, 304 U. S. 458, 462, 463. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell* v. *Alabama*, 287 U. S. 45, so are we clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292. Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. We are told that since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to vigorously renew his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. *Johnson* v. *Zerbst*, 304 U. S. 458, 464. But it is by no means conclusive.

Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty "is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Patton* v. *United States*, 281 U. S. 276, 312-313. The trial court should protect the right of an accused to have the assistance of counsel. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted "if

your Honor wishes to appoint him (Stewart)", and Stewart immediately replied: "As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't control that." The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.

Glasser urges that the court's appointment of Stewart as counsel for Kretske embarrassed and inhibited Stewart's conduct of his defense in that it prevented Stewart from adequately safeguarding Glasser's right to have incompetent evidence excluded and from fully cross-examining the witnesses for the prosecution.

One Brantman, an accountant known to Kretske and recommended professionally by him to a client, testified that he gave Kretske $3000 on behalf of one Abosketes. He further testified that he did not know Glasser. Stewart secured a postponement of cross-examination for "In view of the fact that your Honor appointed me for Mr. Kretske, I am not prepared to cross-examine."

Abosketes took the stand immediately after Brantman and testified that Brantman told him that he was about to be indicted and offered to "fix" the case with someone in the Federal Building for $5000. About the time of this meeting Glasser and investigator Bailey were questioning one Brown, who had been convicted for operating a still, to determine whether Abosketes was connected with that still. Abosketes referred frequently to Glasser in his testimony and indicated that Glasser and Brantman were linked together. Thus he testified that Brantman told him "They have got the goods on you, Mr. Glasser has got it out of Brown." When questioned as to his knowledge of Brantman's connections, Abosketes replied: "There was more than a fix, if indictment was stopped. He (Brantman) knows Mr. Glasser and that was all there was to it." And, later: "He had connections to stop things like that, he had connections in the Federal Building." And, again: "I could not be sure that this man (Brantman) was not putting a shake on me and be honest about it. I could not go over and ask Mr. Glasser if Mr. Brantman was able to fix him. I thought Brantman could, though. I was kind of hoping he could. If I did not think he could, I would not have given him the money."

Brantman was re-called three days later. Stewart declined cross-examination. That this decision was influenced by a desire

to protect Kretske can reasonably be inferred from the colloquy between the court and Stewart before sentence was imposed. At that time Stewart told the court that, lest his failure to cross-examine Brantman reflect on Kretske, the reason for his forbearance was that he feared that Brantman would tell worse lies. But, especially after the intervening testimony of Abosketes, a thorough cross-examination was indicated in Glasser's interest to fully develop Brantman's lack of reference to, or knowledge of Glasser. Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring.

Glasser also argues that certain testimony, inadmissible as to him was allowed without objection by Stewart on his behalf because of Stewart's desire to avoid prejudice to Kretske. The testimony complained of is that Elmer Swanson, Frank Hodorowicz, Edward Dewes, and Stanley Wasielewski as to statements made by Kretske, not in the presence of Glasser, and heard by them which implicated Glasser. Glasser has red hair, and the statements made by Kretske were that he would have to see "Red", or send the money over to the "red-head", etc., in connection with "fixing" cases.[5]

Glasser contends that such statements constituted inadmissible hearsay as to him and that Stewart forewent this obvious objection lest an objection on behalf of Glasser alone leave with the jury the impression that the testimony was true as to Kretske. The Government attacks this argument as unsound, and, relying on the doctrine that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against

[5] Elmer Swanson testified that when money was paid to Kretske in connection with the Stony Island still case Kretske said that part of it would go to "Red or Dan". The witness understood this to refer to Glasser.

Frank Hodorowicz testified that he gave $800 in currency to Kretske to secure favorable action with regard to a still at 124 East 118th Place. Kretske told Frank he "had to deliver the money to Red". Hodorowicz knew this meant Glasser. Frank attempted to "fix" a case for Albina Zarrattini through Kretske who declined after "he talked to Red" because Zarrattini talked too much.

After Frank Hodorowicz was himself indicted he went to Kretske to "fix" his case. Kretske told him there was "a lot of heat" on the case and "They got Glasser over a barrel, he can't do anything. He has to put you in jail."

When Edward Dewes gave Kretske $100 so that he would not be indicted in connection with a still at Spring Grove, Kretske told him "he would send it over to the red-head in the Federal Building." The witness knew this meant Glasser. Dewes also testified that Kretske told him that he, Kretske, had resigned from the United States attorney's office under pressure, and that "for holding the bag", he was to receive favors from the "red-head".

Stanley Wasielewski testified that he heard Kretske tell Stanley Slesur that "I will take care of everything between me and the red-head." Both Wasielewski and Slesur were involved in a still at Downers Grove.

his co-conspirators, *Logan* v. *United States*, 144 U. S. 263, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner* v. *United States*, 57 F. 2d 506; and see *Nudd* v. *Burrows*, 91 U. S. 426. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.

Glasser urges that independent of the statements complained of there is no proof connecting him with the conspiracy. Clearly the statements were damaging. Other evidence tending to connect Glasser with the conspiracy is rather meagre by comparison. Frank Hodorowicz testified that Glasser apologized to him after his indictment because he, Glasser, could do nothing for Hodorowicz. Hodorowicz also testified that he sent a case of whiskey to Glasser for Christmas, 1937. Victor Raubunas testified that he saw Glasser, Kretske and Kaplan meet on three occasions. An alcohol agent, Dowd, testified that Glasser expelled him from the court-room during the trial of a libel case in which Roth represented the successful claimant. Glasser released Raubunas and one Joppek, who were picked up on different occasions for suspected liquor violations, without extensive questioning. Whether testimony such as this was sufficient to establish the participation of Glasser in the conspiracy we need not decide. That is beside the point. The important fact is that no objection was offered by Stewart on Glasser's behalf to the statements complained of, and this despite the fact that, when the court broached the possibility of Stewart's appointment, Stewart told the court that statements of this nature were not binding on Glasser. That this is indicative of Stewart's struggle to serve two masters cannot seriously be doubted.

There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow

courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *Tumey* v. *Ohio*, 273 U. S. 510, 535; *Patton* v. *United States*, 281 U. S. 276, 292. And see *McCandless* v. *United States*, 298 U. S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the individed assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser.

But this error does not require that the convictions of the other petitioners be set aside. To secure a new trial they must show that the denial of Glasser's constitutional rights prejudiced them in some manner, for where error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them. *Agnello* v. *United States*, 296 U. S. 20; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Rossi* v. *United States*, 278 F. 349; *Belfi* v. *United States*, 259 F. 822; *Browne* v. *United States*, 145 F. ?; *Dufour* v. *United States*, 37 App. D. C. 497. Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him. Roth argues the point, but he was represented throughout the case by his own attorney. We fail to see that the denial of Glasser's right to have the assistance of counsel affected Roth.

Turning now to the contentions of Kretske and Roth, we are clear that substantial evidence supports the verdict against both. As noted before, Kretske does not raise the point other than to mention that the testimony against him was largely that of accomplices and unsavory characters. The short answer to this is that the credibility of a witness is a question for the jury.

The evidence against Roth discloses the following salient facts. Elmer Swanson, Clem Dowiat and Anthony Hodorowicz were arrested in connection with a still on Stony Island Avenue. Frank Hodorowicz, the head of the Hodorowicz crowd, arranged a meeting with Kretske at his hardware store to "take care" of the case. Horton was present and Kretske told the group that there "was a lot of heat" on the case but that it could be arranged so that nobody "would go to jail" for $1200, part of which "Red" was to get. A down payment of $500 was made. When a lawyer was sought, Kretske referred the prospective defendants to Roth. He represented them at the hearing before the Commissioner which was continued at the request of Glasser. After an indictment was returned, Roth appeared for trial to find that the case had been stricken from the docket with leave to reinstate it. The defendants were never brought to trial. None of the Hodorowiczes or their associates paid Roth for his services. Roth testified that he received his fee from Kretske.

In June 1938 Glasser secured two indictments, one against Frank, Mike, and Peter Hodorowicz and Clem Dowiat, and the other against Frank, and Peter Hodorowicz and Dowiat for the sale of illicit alcohol. Frank paid Kretske $250 after the indictments. Kretske later told him that nothing could be done as investigator Bailey was pressing Glasser. Frank then went to see Roth, who with Kretske went to see Glasser. Roth later told Frank that nothing could be done and suggested that he get an attorney and prepare to defend himself. Roth's explanation of this was that he went to Glasser to learn the latter's attitude toward clemency for Frank, and that he suggested the retention of two lawyers, one to defend Frank, and the other to represent the remaining defendants. Frank dispensed with Roth's services and was represented at the trial by one Hess. Frank paid Roth $50, but this was in connection with substituting some securities on his bond.

Edward Dewes had been associated with the defendant Kaplan in a still at Spring Grove. That case was twice presented to a

grand jury by Glasser but withdrawn on each occasion. Two days before it was presented a third time the defendant Horton told Dewes that Kretske wished to see him. Dewes went to Kretske's office and paid him $100 so that he would not be indicted. Dewes was no-billed in that case. Dewes was also involved in a still on the farm of one Beisner. It was raided and several were arrested. Dewes, Victor Raubunas and Edward Farber asked Horton to "fix" that case, but when his price was thought too high, Farber, who had known Kretske for some time, took Dewes and Raubunas to Kretske's office. Kretske offered to take care of the case for $1200. Raubunas paid $300 and they were told they would need no lawyer at the preliminary hearing. Eventually Raubunas, Dewes and Beisner were indicted. Dewes thereafter paid Kretske $275 to "fix" his case. Kretske referred the matter to Roth who represented Dewes throughout his trial. Dewes testified that he neither retained nor paid Roth.

Paul Svec, an associate of one Yarrio, was arrested in 1937 for a liquor violation. Horton arranged his bond. In Svec's presence Horton picked up Kretske and Yarrio. They told Svec not to worry. He was thereafter indicted and convicted. While at liberty pending an appeal he was again arrested. This time he called Glasser, and according to the latter, offered him money. The following morning Glasser interrogated Svec in the hearing of a secreted agent of the Federal Bureau of Investigation and secured admissions that Svec had never paid Glasser money or received any promises from him, and that the call had been at the instigation of the arresting investigators. Svec testified that Roth told him that he "stood up o. k." under Glasser's questioning. Svec was discharged at the Commissioner's hearing.

Glasser prosecuted Leo Vitale for the operation of a still. He was convicted and received a sentence of one hour in the custody of the marshal. Vitale's wife, Rose, was the claimant in a subsequent libel action against a car allegedly used to transport illicit liquor. The case was referred to Roth by Kretske. Roth informed the court that Vitale was "o. k." and that the car was not used for illegal purposes. As was the custom, the case was tried on the agent's report. It was dismissed. Investigator Dowd later informed Glasser that he had heard that Vitale had boasted that "he got out of this for nine hundred dollars".

In April 1938 Edward and William Wroblewski were indicted in the Northern District of Indiana. They engaged Roth as their counsel. They did not remember how they met Roth. When asked

by the court if anyone recommended Roth to him, Edward answered: "No, sir, I don't remember whether it was a rumor about his name." According to Alexander Campbell, an assistant United States attorney in that district, Roth appeared in his office in September 1938 and asked if the Wroblewskis had been indicted. Campbell replied that he did not know off-hand but would check the files. Roth then asked, if the files showed no indictment, whether some arrangement could be made so that no indictment would be returned. He offered Campbell $500 or $1000. When Campbell refused, Roth said: "Well, that is the way we handle cases in Chicago sometimes". The Wroblewskis were convicted. Subsequently Roth asked Campbell to use his influence to stop the investigation in Chicago by Bailey which resulted in the instant case.

It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *Manton*, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances". *United States* v. *Manton, supra.* We are clear that from the circumstances outlined above the jury could infer the existence of a conspiracy and the participation of Roth in it. Roth's statements to Campbell in the Wroblewski matter, his suggestion to Frank Hodorowicz that he should get a lawyer and prepare to defend himself when the case could not be "fixed", the fact that he received no fees from the Hodorowiczes with the exception of $50 in connection with Frank's bond, Dewes' testimony that he neither retained nor paid Roth, Roth's commendation of Svec's bearing under Glasser's interrogation, all furnish the necessary support for the jury's verdict.

The objections of Kretske and Roth with regard to the admission of certain evidence are without merit. The reports of investigators of the Alcohol Tax Unit on stills at Western Avenue and at Spring Grove, operated by the defendant Kaplan and his associates, were admitted as Government exhibits 81A and 113. Each contained statements taken from prospective witnesses by the investigators, and each gave a description of the prospective defendants. Kaplan was referred to as of Jewish descent, a bootlegger by reputation, and mention was made of the arrest of

Kaplan and Edward Dewes in connection with the killing of one Pinna. At the time each report was admitted the trial judge informed the jury that it was admitted only against Glasser and continued: "At some further stage of the proceedings I may advise you with reference to its competency as to the other defendants, but for the time being it will be admissible only against the defendant Glasser". The record before us contains no indication that the jury was later informed that the exhibits were evidence against the defendants other than Glasser. The claim of Kretske and Roth that the admission of these reports was prejudicial to Kaplan and that they are entitled to take advantage of that error ignores the fact that they were admitted against Glasser alone.

No reversible error was committed by overruling objections to the testimony of Alexander Campbell with relation to his dealings with Roth. Trial judges have a measure of discretion in allowing testimony which discloses the purpose, knowledge, or design of a particular person. *Butler* v. *United States*, 53 F. 2d 800; *Simpkins* v. *United States*, 78 F. 2d 594, 598. We do not think the bounds of that discretion were exceeded here. The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind.

The judge conducting a jury trial in a federal court is "not a mere moderator, but is the governor of the trial for the purpose of insuring its proper conduct". *Quercia* v. *United States*, 289 U. S. 466, 469. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. Petitioners contend that the trial judge made remarks prejudicial to them, committed acts of advocacy, questioned them in a hostile manner, unduly limited cross-examination, and in general failed to maintain an impartial attitude. Various incidents in support of those contentions are brought to our attention.

The court did interrogate several witnesses, but in the main such interrogation was within its power to elicit the truth by an examination of the witnesses. *United States* v. *Gross*, 103 F. 2d 11; *United States* v. *Breen*, 96 F. 2d 782. In asking Anthony Hodorowicz whether there had been a full disclosure of his connection with the Stony Island still when he appeared before Judge Woodward the court obviously was under a misapprehension of the nature of the appearance. It was simply for the purpose of arraignment, and of course no testimony was offered. Much is made of this, but

at the time no one attempted to explain to the court the nature of the appearance. Stewart later brought out on cross-examination that it was only an arraignment and that there was no necessity for testimony on that day.

After the testimony of Abosketes the court read into the record the fact that Abosketes was indicted in Wisconsin in 1936 and 1938, and that he pleaded guilty to one indictment and that the other was dismissed. It is, of course, improper for a judge to assume the role of a witness, but we cannot here conclude that prejudicial error resulted. Abosketes had briefly referred to his troubles in Wisconsin in his testimony.

The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. *Alford* v. *United States*, 282 U. S. 687. We find no abuse of that discretion.

Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240; *Goldstein* v. *United States*, [illegible] F. 2d 609; *United States* v. *Warren*, 120 F. 2d 211.

Separate consideration of the numerous instances of alleged prejudicial misconduct on the part of the prosecuting attorney would unduly extend this opinion. Suffice it to say that after due consideration we conclude that no one instance, nor the combination of them all constitutes reversible error.

All the petitioners contend that they were denied an impartial trial because of the alleged exclusion from the petit jury panel of all women not members of the Illinois League of Women Voters. In support of their motions for a new trial Glasser and Roth filed affidavits which are the basis of petitioners' present contentions. Kretske did not file an affidavit, but he urges the point here.

Glasser swore on information and belief that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and prepared exclusively from its membership, that the women on that list had attended "jury classes whose lecturers presented the views of the prosecution", and

that women not members of the League, but otherwise qualified, were systematically excluded, by reason of which affiant "did not have a trial by a jury free from bias, prejudice, and prior instructions, and as a result thereof the jury was disqualified and this affiant's rights were prejudiced in that he was deprived of a trial by jury guaranteed to him by the laws and the constitution of the United States of America, and particularly the 5th and 6th amendment, all of which he offers to prove." The source of Glasser's information was stated to be a then current article, "Women and the Law", in the American Bar Association Journal for April 1940 (Vol. 26, No. 4). Roth's affidavit merely gave Glasser as his source of information and made no offer of proof. The court overruled the motions for a new trial. The record discloses that the jury was composed of six men and six women.

Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but while proclaiming trial by jury as "the glory of the English law", Blackstone was careful to note that it was but a "privilege". *Commentaries,* Book 3, p. 379. Our Constitution transforms that privilege into a right in criminal proceedings in a federal court. This was recognized by Justice Story: "When our more immediate ancestors removed to America, they brought this great privilege (trial by jury in criminal cases) with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." 2 Story, Const. sec. 1779.

Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial. When the original Constitution provided only that "The trial of all crimes, except in cases of impeachment, shall be by jury;"[6] the people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the Sixth Amendment which provides that the jury must be impartial.

For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitu-

[6] Const., Art. III, § 2, cl. 3.

tion was adopted. *Patton* v. *United States,* 281 U. S. 276. But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas,* 311 U. S. 128. 130.

Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Secs. 275, 276 Jud. Code; 28 U. S. C. secs. 411, 412. This duty of selection may not be delegated. *United States* v. *Murphy,* 224 F. 554; *In re Petition for a Special Grand Jury,* 50 F. 2d 433. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community", and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is

then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

So, if the picture in this case actually is as alleged in Glasser's affidavit, we would be compelled to set aside the trial court's denial of the motion for a new trial as a clear abuse of discretion, and order a new trial for all the petitioners. But from the record before us we must conclude that petitioners' showing is insufficient. The Government did not controvert the affidavits by counter-affidavits or formal denial, and it does not appear from the record that any argument was heard on them. From this petitioners argue that the allegations of the affidavits are to be taken as true for the purpose of the motion. However, this is not a case where the prosecution has impliedly, *Neal* v. *Delaware*, 103 U. S. 370, or actually, *Hale* v. *Kentucky*, 303 U. S. 613, stipulated that affidavits in support of a motion alleging the improper constitution of a jury may be accepted as proof. In the absence of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; cf. *Brownfield* v. *South Carolina*, 189 U. S. 426. Glasser, in his affidavit, offered to prove the allegations contained therein, but the record is barren of any actual tender of proof on his part. Furthermore, there is no indication that the court refused to entertain such an offer, if it were in fact made. Roth did not even make an offer of proof in his affidavit, and Kretske did not file one. While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted, *Carter* v. *Texas*, 177 U. S. 442, there is, and, on the state of this record, can be no assertion that such error was here committed. The failure of petitioners to prove their contention is fatal.

We conclude that the conviction of Glasser must be set aside and the cause as to him remanded to the District Court for the Eastern Division of the Northern District of Illinois for a new trial. The convictions of petitioners Kretske and Roth are in all respects upheld.

It is so ordered.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES.

Nos. 30, 31, 32.—October Term, 1941.

Daniel D. Glasser, Petitioner, 30 *vs.* The United States of America. Norton I. Kretske, Petitioner, 31 *vs.* The United States of America. Alfred E. Roth, Petitioner, 32 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 19, 1942.]

Mr. Justice Frankfurter.

The Chief Justice and I are of opinion that the conviction of Glasser, as well as that of his co-defendants, should stand.

It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. To set aside the conviction of Glasser (a lawyer who served as an Assistant United States Attorney for more than four years) after a trial lasting longer than a month on the ground that he was denied the basic constitutional right "to have the assistance of counsel for his defence" is to give fresh point to this regrettably familiar phenomenon. For Glasser himself made no such claim at any of the critical occasions throughout the proceedings. Neither when the judge appointed Stewart to act as counsel for both Kretske and Glasser, nor at any time during the long trial, nor in his motions to set aside the verdict and to arrest judgment, nor in his plea to the court before sentence was passed, nor in setting forth his grounds for appeal, did Glasser assert, or manifest in any way a belief, that he was denied the effective assistance of counsel. Not until twenty weeks after Stewart had become counsel for the co-defendant Kretske, and fifteen weeks

after the trial had ended, did Glasser discover that he had been deprived of his constitutional rights. This was obviously a lawyer's afterthought. It does not promote respect for the Bill of Rights to turn such an afterthought into an imaginary injury that is reflected nowhere in the contemporaneous record of the trial and make it the basis for reversal.

The guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances. The fact that Glasser is an attorney of course does not mean that he is not entitled to the protection which is afforded all persons by the Sixth Amendment. But the fact that he is an attorney with special experience in criminal cases, and not a helpless illiterate, may be—as we believe it to be here—extremely relevant in determining whether he was denied such protection.

In this light, what does the record show? Before the trial got under way the trial judge was presented with a problem created by the inability of one of Kretske's lawyers to try the case in his behalf. Kretske was dissatisfied with his other lawyer, who professed to be unfamiliar with the many details of the case. Upon Kretske's motion for a continuance, the judge was faced with the difficulty of avoiding either delay of the trial or an undesirable severance as to Kretske. All the defendants, including Glasser, and their counsel were present in court. The judge asked whether Stewart, who had been retained by Glasser, would be prepared to act also for Kretske. The record gives no possible ground for any inference other than that this suggestion came from the judge as a fair and disinterested proposal to solve a not unfamiliar trial problem. It is not, and indeed could not be, contended that the judge's suggestion, addressed to the consideration of the defendants, was not wholly proper. And so, when Stewart raised the question of a possible conflict of interest, and Glasser himself objected, saying "I would like to have my own lawyer representing me", the judge neither remonstrated nor argued. He promptly dropped his suggestion and directed Kretske's other lawyer, who was present but with whom Kretske was dissatisfied, to stay in the case until Kretske could hire someone to his satisfaction. The footnote sets forth the full text of this episode.[1]

---

[1] "Mr. Stewart: May I make this statement about that, judge? We were talking about it—we were all trying to get along together. I filed an affidavit, or I did on the behalf of Mr. Glasser pointing out some little inconsistency in

There ensued a long discussion relating to the representation of Kretske. During this discussion the judge never again adverted to his original suggestion that Stewart also represent Kretske. Kretske interrupted, and there then occurred in Glasser's presence what is now made the basis for reversal:

"Mr. Kretske: I can end this. I just spoke to Mr. Stewart and he said if your Honor wishes to appoint him I think we can accept the appointment.

"Mr. Stewart: As long as the Court knows the situation. I think there is something to the fact that the jury knows we can't control that.

"Mr. McDonnell: Then the order is vacated?

"The Court: The order appointing Mr. McDonnell is vacated and Mr. Stewart is appointed attorney for Mr. Kretske."

It is clear, therefore, that this arrangement was voluntarily assumed by the parties, and was not pressed upon them by the judge. Glasser, who was present, raised no objection and made no comment.

The requirement that timely objections be made to prejudicial rulings of a trial judge often has the semblance of traps for the unwary and uninformed. But Glasser was neither unwary nor uninformed. His experience in the prosecution of criminal cases makes his silence here most significant. Nor was this the last opportunity he had to indicate that embarrassment was being caused him by Stewart's representation of Kretske, let alone that he deemed

---

the defense, and the main part of it is this: There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together, and all the evidence—

The Court: How would it be if I appointed you as attorney for Mr. Kretske?

Mr. Stewart: That would be for your Honor to decide.

The Court: I know you are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?

Mr. Stewart: Your Honor could judge that as well as I could.

The Court: I think it would be favorable to the defendant Kretske.

Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer representing him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.

The Court: Mr. McDonnell, you will have to stay in it until Mr. Kretske gets another lawyer, if he isn't satisfied with you. (To Mr. Kretske) Mr. Kretske, if you are not satisfied with Mr. McDonnell, you will have to hire another lawyer. We will proceed with the selection of the jury now."

it a denial of his constitutional rights. If he were laboring under a handicap, he would have made it known at the times when he felt it most—during the long course of the trial, in his motions for new trial and in arrest of judgment, in his extended plea to the court before sentence was passed, and finally when, on April 26, 1940, over his own signature he gave twenty grounds for appeal but did not mention this one. The long period of uninterrupted silence concerning his after-discovered injury negatives its existence. We find it difficult to know what acquiescence in a judge's ruling could be, if this record does not show it.[2]

A fair reading of the record thus precludes the inference that the judge forced upon Glasser a situation which hobbled him in his defense. To be sure, he did say at first that he would like his lawyer to represent him alone. But he plainly acquiesced in the arrangement which, after consultation at the defense table, was proposed to the trial judge and which the judge accepted. A conspiracy trial presents complicated questions of strategy for the defense. There are advantages and disadvantages in having separate counsel for each defendant or a single counsel for more than one. Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack. These considerations could not have escaped a lawyer of Glasser's experience. His thorough acquiescence in the proceedings cannot be reconciled with a denial of his constitutional rights.

A belated showing that Glasser was actually prejudiced by the judge's action is now attempted. This has two aspects: (1) Stewart's failure to cross-examine the witness Brantman, and (2) his failure to make objections on behalf of Glasser to the admission of certain evidence.

(1) The Brantman episode evaporates upon examination. His only testimony relating to Glasser was that he did not know him.

---

[2] Stewart was designated to represent Kretske on February 6, 1940, when the trial began. The jury brought in its verdict on March 8. The motions for new trial and in arrest of judgment were denied on April 23, and on the same day the defendants were sentenced. On April 26, Glasser filed a notice setting forth twenty grounds of appeal without suggesting that he had been denied his right to the assistance of counsel. On June 27, Glasser and the two other petitioners filed a "joint and several assignment of errors", for the first time asserting that: "The court erred in appointing the employed counsel of defendant Daniel D. Glasser to represent defendant Norton I. Kretske, to the prejudice of the defendants."

This was brought out fully and distinctly on direct examination.[3] That it had been amply established, Glasser himself recognised in his address to the court before sentence. It is difficult to understand how cross-examination would have been of any further benefit to Glasser. In any event, the record shows that Stewart abstained from cross-examining Brantman not because he felt himself inhibited by any conflict of interest but because, as he told the judge after verdict, he thought that on cross-examination Brantman "would be telling worse lies".

(2) It is said that Stewart's failure to object, on behalf of Glasser, to certain evidence in itself proves that Stewart felt himself restricted—wholly regardless of the admissibility of such evidence. No evidence inadmissible against Glasser is avouched. Indeed we are told that it is "beside the point" that the evidence is admissible. Can it be that a lawyer who fails to make frivolous objections to admissible evidence is thereby denying his client the constitutional right to the assistance of counsel?

---

[3] "Q. Do you know Mr. Glasser?
A. No, sir,
Q. Did you ever see him before the time you got this money?
A. I have seen him, I think I might have been introduced to the man once, but I don't think it was before I got that money.
Q. You never had any conversation with him in any event?
A. No, sir.
Q. What?
A. No, sir."